Nos. 962, 963, 980

In the Supreme Court of the United States

OCTOBER TERM, 1940

MARTIN M. GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

JACOB P. SHULMAN, PETITIONER

v.

UNITED STATES OF AMERICA

THEODORE GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1089–1096) is reported in 118 F. (2d) 310.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 26, 1941 (R. 1104). Petitions for writs of certiorari were filed on behalf of Martin M. Goldman and Jacob P. Shulman on April 18, 1941, and on behalf of Theodore Goldman on April 23, 1941; all the petitions were denied on June 2, 1941. On October 20, 1941, this Court granted a petition for rehearing filed on August 21, 1941, vacated its order denying the petitions for writs of certiorari, and granted the petitions (R. 1107–1108). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether any evidence against petitioners was obtained by means of a trespass or unlawful entry.

2. Whether evidence obtained by eavesdropping upon conversations in an adjoining room by means of a "detectaphone"—a listening device which amplifies sound vibrations coming through the wall—should be excluded in the federal courts, on the ground that such eavesdropping constitutes an unreasonable search prohibited by the Fourth Amendment.

3. Whether such evidence, even if inadmissible against the lawful tenant of the room in which the

conversations occurred, is admissible against his two co-conspirators, neither of whom had any possessory interest in the room and only one of whom participated in any of the conversations which were overheard.

4. Whether overhearing one end of a telephone conversation in an adjoining room by means of a detectaphone constitutes an interception of a communication prohibited by Section 605 of the Federal Communications Act.

5. Whether petitioners were entitled to inspect official memoranda prepared by federal agents who refreshed their recollections therefrom before being sworn as witnesses.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), provides in part as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in

transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

STATEMENT

Petitioners and one Kandell were indicted on February 1, 1940 (R. 9), in the United States District Court for the Southern District of New York for conspiracy to violate 11 U. S. C., Section 52 (b) (5). The indictment, which was in one count, charged in part that the defendants conspired to file a petition in bankruptcy and to cause it to be dismissed in consideration of fraudulently receiving a sum of approximately $400 from one Robert Hoffman and others (R. 3–7). The indictment was dismissed as to Kandell at

the close of the Government's case (R. 531). The petitioners were convicted on July 26, 1940 (R. 943), and each of them received a prison sentence of eighteen months and a fine of $25 (R. 14, 16, 18). The convictions were affirmed by the Circuit Court of Appeals for the Second Circuit (R. 1104).

The evidence supporting the convictions, the sufficiency of which petitioners do not challenge, may be summarized as follows:

On March 22, 1937, Paul Hymovitz, owner of a dry-goods store, executed a general assignment for the benefit of his creditors (Govt. Ex. 1, R. 955–959) to Samuel Kolman, an associate of Robert Hoffman, an attorney who had been retained by Hymovitz's relatives to liquidate the business (R. 177–178, 968, Govt. Ex. 2b). The assignee procured a court order permitting him to sell Hymovitz's goods at auction, and proceeded to hire the auctioneer (R. 996, Govt. Ex. 5c) and advise the creditors of the proposed sale (R. 993, Govt. Ex. 5). Petitioner Martin Goldman, counsel for certain creditors, at the occasion of a creditors' meeting took Hoffman aside and proposed to him that the assets of Hymovitz be sold in bulk for a sum sufficient to allow for a 40% settlement with creditors, payment of necessary expenses, and in addition $400 to be secretly divided among those actively participating in the scheme (R. 193–194, 201–202, 207–212). The plan contemplated an arrangement with the buyer which would keep the creditors in ignorance of

the true sale price of the goods (R. 193). Goldman explained that Kandell, an officer of the Dry Goods and Furnishings Association, who represented one of the creditors at the creditors' meeting (R. 187–188, 803), would "handle" the absent creditors and that those creditors present at the meeting would get ten dollars each to "shut their mouths" (R. 194).

Hoffman refused to join in this plan (R. 194). Thereafter, on April 3, 1937, petitioner Shulman, an attorney representing some of the creditors, filed an involuntary bankruptcy petition, the allegations of which were so indefinite that it could be dismissed for insufficiency without notice to creditors in case Hoffman should change his mind (R. 196, 202, Govt. Ex. 3, R. 978). A stay of the assignee's auction sale was obtained *ex parte* and was served upon Hoffman on the morning for which the sale was scheduled (R. 198, Govt. Ex. 3, R. 980). On April 5, after a hearing on the stay order at which the judge refused to vacate it (R. 200), Hoffman had a conference with Shulman in the latter's office (R. 201). Shulman inquired whether Hoffman was willing to do business along the lines previously outlined by petitioner Martin Goldman, that is, that the goods were to be sold in bulk to a private purchaser, that the creditors were to receive a settlement amounting to less than the net purchase price, after payment of necessary expenses, and that the remaining undisclosed portion of the purchase price was to be divided among Hoff-

man, Shulman, and Goldman (R. 201–202). Only if Hoffman consented to the deal, Shulman explained, would the petition in bankruptcy be dismissed (R. 202). Hoffman acquiesced and then went directly to the referee in bankruptcy and disclosed the scheme (R. 202). The referee informed Hoffman that "there had been many complaints made about these same defendants" (R. 291), and called in a representative of the Federal Bureau of Investigation, to whom Hoffman exposed petitioners' plan. Thereafter Hoffman, acting under instructions of the Bureau, continued to feign his willingness to enter into the conspiracy (R. 291).

After several conferences, Shulman and Hoffman arrived at an apparent understanding as to the bulk sale. Hoffman prepared a bill of sale in blank (R. 214) in which, at Shulman's suggestion, a fictitious name was inserted as purchaser in lieu of the name of the true prospective purchaser (R. 214, 454). Petitioner Theodore Goldman, a brother and partner of Martin Goldman, who was to receive a part of Martin Goldman's share (R. 211, 740, 836–840), then prepared and, on April 26, sent to Hoffman the papers necessary to dismiss the petition in bankruptcy (R. 219–220), which was dismissed on May 14, 1937 (Govt. Ex. 3, R. 988). The successful culmination of the petitioners' plan, however, was frustrated by the refusal of a creditor to release in full for the percentage offered (R. 223, 319–323).

Meanwhile, on the night of April 6, 1937, two agents of the Federal Bureau of Investigation, Turner and Ransom, went to the office building where petitioner Shulman maintained his office, in order to install a device to overhear a conference among Hoffman and some of the petitioners scheduled for the following afternoon (R. 303). With the consent and assistance of the building superintendent, but without the knowledge of Shulman, the agents obtained access to Shulman's office, Room 1509, and to the adjoining office, Room 1508, which was unoccupied (R. 45–46, 53, 56–57, 88). There was a small opening for a steam pipe at the base of the wall between the two offices. Through the space between the pipe and the edge of the aperture the agents passed a wire from Room 1508 into Room 1509, far enough to attach a small disc-shaped carbon microphone. The microphone was then drawn back into the hole until it was about an inch inside the wallpaper surface of Shulman's office (R. 87–89). In Room 1508 the wire was attached to an amplifier and headphones. The agents tested the installation and, finding it satisfactory, disconnected the amplifier and earphones and departed, leaving only the microphone in the wall with a small piece of wire leading into Room 1508 (R. 86–87, 90, 96–97).

The following afternoon, Turner returned to Room 1508 accompanied by agents Schroeder and Rubenstein and a stenographer. They brought with them the amplifier and earphones, which were

once more connected with the carbon microphone (R. 100). They also installed another and wholly different listening device known as a detectaphone. This instrument, consisting of a delicate needle which contacts a crystal microphone connected to an amplifier, is more sensitive than a carbon microphone (R. 94, 98). The needle, upon contact with a wall, is activated by sound waves penetrating the wall from the adjoining room, without the aid of a wire or opening leading into that room (R. 94). The detectaphone is equipped with its own amplifier as well as earphones (R. 101, 104).

As we show in more detail in Point I of the Argument, the location of the detectaphone on the wall was determined by a process of trial and error and not by the knowledge which agent Turner had secured the night before of the lay-out of Shulman's office. Schroeder moved the detectaphone over the wall experimentally until he ascertained the most advantageous position for listening (R. 113–117, 119–120). It was discovered that the carbon microphone in the wall, probably because the steam was now turned on in the pipe, yielded nothing intelligible, and this apparatus was dismantled (R. 98, 102, 105–106, 119–123, 152, 160–161).

Employing only the detectaphone on the wall in Room 1508, the agents overheard, and the stenographer transcribed, the audible portions of Hoffman's conference in Room 1509 with Shulman that afternoon as well as succeeding conferences on

April 14, 21, and 26 (Govt. Exs. 18-a, 19-a, 20-a, 21-a; R. 383–453, 302, 372–373).

Petitioner Martin Goldman attended only the conference on April 7 (R. 390–405). Petitioner Theodore Goldman did not participate in any of the conversations overheard.

Before the trial, Shulman filed a motion to suppress alleged illegally obtained evidence (R. 20–27). A preliminary hearing was held and at its conclusion the trial court found as facts that no evidence had been obtained from the carbon microphone which was installed pursuant to the trespass in Shulman's office, and that the unlawful entry for the purpose of installing the carbon microphone did not facilitate the installation or use of the detectaphone. The court concluded that the evidence acquired through use of the detectaphone was not obtained in violation of the Fourth Amendment or of Section 605 of the Federal Communications Act (R. 164–168). It accordingly denied the motion to suppress (*ibid.*).

At the trial the court permitted the stenographer who had transcribed the conversations overheard by means of the detectaphone to read the transcripts thereof in evidence (R. 382–451). These transcripts corroborated the testimony of Hoffman and were, in turn, corroborated by Turner and one of the other government agents who had listened in on the conversations.

Both at the preliminary hearing and at the trial, defense counsel claimed the right to inspect

notes and memoranda made by the agents in the course of their investigation and to require the production of such papers from the files of the Federal Bureau of Investigation (R. 107, 108, 125, 156, 471, 482). It appeared that the agents had reviewed these notes and memoranda before testifying (R. 106, 132). The trial court noted that the memoranda were confidential communications among the investigating officers of the Government (R. 477–478), and ruled that counsel were not entitled to inspect them since they were not used by the witnesses to refresh their recollection while on the stand (R. 128–129, 470–472, 475, 482–485). Moreover, the court, after examination of the controverted documents, declared at the preliminary hearing that they embraced material which the Government should not be required to disclose to the defense in advance of the trial and which bore no relation to the legality of the investigating methods used (R. 109–111, 127).

SUMMARY OF ARGUMENT

I

Evidence of the conversations heard by means of the detectaphone was not inadmissible on the ground that it was obtained as a result of an unconstitutional trespass. The courts below found, and the evidence shows, that the installation and use of the detectaphone were not aided by the previous unlawful entry into Shulman's office.

II

Petitioners' rights under the Fourth Amendment were not violated by the use of the detectaphone. Invasion of an individual's privacy, however distasteful, is not *per se* repugnant to the Fourth Amendment; many such invasions are sanctioned. Invasions of the type here involved should be judged on broad grounds of choice between conflicting *desiderata*. The choice is essentially one to be made by the legislative or the executive branch of the Government, and should not be removed from the realm of regulation by all-embracing constitutional interdict.

A. For constitutional purposes, the use of a detectaphone is not distinguishable from wire-tapping. The instant case, therefore, is controlled by *Olmstead* v. *United States*, 277 U. S. 438, and, accordingly, no "search" within the meaning of the Fourth Amendment is involved.

B. The *Olmstead* case was correctly decided and its doctrine should be reaffirmed. The language of the Fourth Amendment relates only to searches and seizures of tangibles and to physical invasions of places or persons. While the Amendment should, of course, be liberally construed in order to achieve its purpose, this does not justify going beyond its purpose by reading into its unusually specific terms a sweeping guaranty of the right of privacy. For to do so would not be to construe but to amend the Constitution in order to achieve a

result the wisdom of which involves the exercise of a delicate political judgment. The right to be let alone must, and always has been, qualified in the light of equally important considerations relating to the power of the Government to protect itself and its citizens from enemies and wrongdoers. Where, as here, the invasion of privacy is simply by aural observation, the considerations of public enforcement should continue to prevail and the invasion should not be regarded as a "search."

The power to employ devices such as the detectaphone and wire-tapping concededly is open to abuse. But this fact is an argument for executive control or regulatory legislation, not for sweeping constitutional prohibition.

C. Even if the *Olmstead* case be overruled and the use of the detectaphone be regarded as a "search," it was not an "unreasonable" search within the meaning of the Fourth Amendment. The general rules relating to warrants cannot be assimilated to a "search" such as the method here involved. The prescribed warrant procedure has application only to search for tangibles, and a detectaphone has no utility in the course of an arrest. The constitutional issue, therefore, must be whether, in all the circumstances, this was an "unreasonable search." If the concept of "search" is extended, the concept of "unreasonableness" must be adjusted accordingly. The adjustment should properly include within the per-

missible constitutional scope the use of a detectaphone to detect criminal activities. Particularly is the use reasonable here since the "search" not only was upon probable cause to believe that a crime was being committed but was also directed to the particular conversations which constituted the "instruments" of the crime.

D. Even if the use of the detectaphone be held to be an unreasonable search as to petitioner Shulman, in whose office the conversations were held, no constitutional rights of petitioners Theodore and Martin Goldman were violated and they are without standing to complain that the evidence obtained was inadmissible against them. Theodore Goldman did not even participate in any of the conversations which were overheard.

III

The fact that the F. B. I. agents, by use of the detectaphone, overheard Shulman talking into a telephone does not constitute a violation of Section 605 of the Communications Act. The conversations so heard were not "wire communications" and the eavesdropping did not constitute "interception" within the meaning of the Act.

IV

The trial court committed no error in denying petitioners the right to inspect confidential memoranda prepared by the government agents from

which the agents refreshed their recollections before being sworn as witnesses. The established federal rule is that inspection of memoranda may be compelled only where the witness uses the paper in the course of his testimony. In any event, the trial court's ruling was correct on the independent ground that the memoranda demanded were privileged official documents.

ARGUMENT

I

NO EVIDENCE AGAINST PETITIONERS WAS OBTAINED BY MEANS OF A TRESPASS OR UNLAWFUL ENTRY

Petitioners contend that the conversations overheard through the detectaphone should have been excluded under the rule enunciated in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, to the effect that evidence obtained by means of an unconstitutional trespass is inadmissible (Br. 9–13). In order to invoke this rule, however, petitioners must show that the overhearing of the conversations by use of the detectaphone resulted, in part at least, from the agents' unlawful entry into Shulman's office on the previous day to install the carbon microphone. They attempt to do this by asserting that the knowledge of the lay-out of Shulman's office, obtained by the unlawful entry, "was bound to be of help" in determining where the detectaphone should be placed (Br. 11).

The assertion is contrary to the concurrent findings of the courts below, amply supported by evidence, that the installation and use of the detectaphone were not aided by the previous trespass (R. 165, 166, 1095). This issue is, of course, one for the trial court and its finding, concurred in by the Circuit Court of Appeals, must be accepted by this Court unless clear error is shown. *Just* v. *Chambers*, 312 U. S. 383, 385; *United States* v. *O'Donnell*, 303 U. S. 501; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464.

The trial court's determination of the issue was plainly justified, if it was not compelled, by the evidence. Agent Schroeder, who installed the detectaphone without ever having been in Shulman's office, testified that he found the most desirable location for the detectaphone by "moving it around the wall until I found a spot where the sounds then going on in the adjoining room would be most advantageously heard" (R. 101). He was corroborated by Agent Turner who witnessed his experiments (R. 119–120). On cross-examination, Schroeder stated that he was helped "somewhat" by the fact that Turner, who had been in Shulman's office the night before, knew "Shulman's office layout" (R. 103); neither agent, however, recalled discussing the arrangement of Shulman's rooms with the other (R. 115–116, 122), and on redirect examination Schroeder testified unequivocally that the installation was accomplished solely by experimen-

tation (R. 116–117). Indeed, the testimony is clear that Schroeder not only received no information as to the lay-out of Shulman's office before installing the detectaphone (R. 112, 116), but that such advice would have been an unwelcome hindrance to the exercise of his own independent judgment (R. 116), because the proper location for a detectaphone can be determined only by taking into account such physical factors as the construction of the wall, its thickness, and the presence of beams or steel structure (R. 95–96, 120). And petitioners' suggestion that a knowledge of Shulman's office arrangements must have saved time in the installation of the detectaphone (Br. 11) is refuted by Schroeder's testimony that he experimented "for about an hour or so" before deciding to use it (R. 102).

Furthermore, even if we assumed, contrary to the finding of the District Court, that knowledge of the lay-out of Shulman's office obtained by the trespass did aid Schroeder in finding the proper location for the detectaphone, this aid was plainly so incidental, and had such an insubstantial relation to the procurement of the evidence, that it must be disregarded. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; *Nardone* v. *United States,* 308 U. S. 338, 341.

Accordingly, since the evidence in question was not obtained as a result of any trespass into Shulman's office but entirely by lawful entry into the

adjoining room, there was no basis for exclusion of the conversations under the rule of *Silverthorne Lumber Co.* v. *United States, supra.*

II

THE USE OF THE DETECTAPHONE DID NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FOURTH AMENDMENT

Petitioners' second contention is that the use of the detectaphone, even though not involving a physical trespass, constitutes a violation of the Fourth Amendment and that consequently the conversations overheard through such use should have been excluded from evidence (Br. 14–22).[1] In their petitions for writs of certiorari, petitioners

[1] Petitioners have abandoned the contention, made below, that the evidence complained of was inadmissible because the use of the detectaphone violated the New York statute prohibiting eavesdropping, L. 1923, c. 642, Section 721 of the Penal Code of New York. That statute is on its face inapplicable to law enforcement officials: "Eavesdropping.—A person who secretly loiters about a building, with intent to overhear a discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor." Cf. *People* v. *Hebberd*, 96 Misc. 617, 620–621 (N. Y. Sup. Ct.) holding the New York statute prohibiting wire-tapping inapplicable to police officers engaged in official duties (Consol. Laws, N. Y., c. 41, Sec. 1423, Par. 6). In any event, it is the settled rule in the federal courts that evidence is not inadmissible merely because it is illegally or unethically, as distinct from unconstitutionally, acquired. *Olmstead* v. *United States*, 277 U. S. 438, 466–467; cf. *McGuire* v. *United States*, 273 U. S. 95, 99; *United States* v. *Mandel*, 17 F. (2d) 270 (D. Mass.); *United States* v. *Marasco*, 266 Fed. 713 (S. D. N. Y.); 5 Jones, *Evidence* (2d ed.), Sec. 2075, p. 3.

conceded that this contention was contrary to *Olmstead* v. *United States*, 277 U. S. 438, and frankly predicated their argument upon the hope of overruling that case. In their petition for rehearing (pp. 12–13) and in their brief on the merits (p. 17), however, petitioners do not specifically challenge the correctness of the *Olmstead* case, but contend that it is distinguishable from the present case. Nevertheless, many of petitioners' arguments, as well as the arguments of *amici curiae*, present contentions totally at variance with the *Olmstead* decision.[2]

It is the position of the Government (1) that, under the doctrine of the *Olmstead* case, the use of a detectaphone does not constitute a "search" or "seizure" within the meaning of the Fourth Amendment; (2) that the *Olmstead* case was correctly decided; and (3) that even if the use of a detectaphone should be considered as a "search" or "seizure" within the meaning of the Fourth Amendment, no unconstitutional invasion of petitioners' rights occurred because the particular use

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[2] Petitioners do not argue that the introduction of the conversations violated their rights under the Fifth Amendment independently of any violation of the Fourth Amendment. As the Court held in the *Olmstead* case (p. 462), "There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk * * *." See also *Holt* v. *United States*, 218 U. S. 245, 252–253; cf. *Schenck* v. *United States*, 249 U. S. 47, 50; *Adams* v. *New York*, 192 U. S. 585, 598; *Burdeau* v. *McDowell*, 256 U. S. 465, 475, 476.

made of the device in this case was not "unreasonable" within the meaning of the Amendment.

We recognize, and indeed emphasize, that our position raises issues of fundamental importance both for the individual citizen and for the nation as a whole. The use of a detectaphone, like the related use of wire-tapping, constitutes an undeniable invasion of privacy—a thing distasteful to us both as individuals and as a people. But this distaste, while it may color, does not solve the constitutional issue. For there are many types of invasion of privacy—the use of stool pigeons, eavesdropping, keyhole-peeping and the like—which are equally distasteful and which are yet plainly beyond the prohibition of the Fourth Amendment.[3] And even the search of the home, the historical occasion for the Amendment, is itself not a violation of the Amendment provided only that a proper warrant be obtained. Yet the warrant procedure, while it may provide protection against abuse, specifically contemplates the invasion, under some circumstances, of the privacy of the particular individual whose home is involved.

Plainly, then, the Fourth Amendment is not a guaranty of privacy either against intrusions of all kinds or against intrusions of any kind under all circumstances. The fact, therefore, that the use of a detectaphone, like the use of wire-tap-

[3] See *Sorrells* v. *United States*, 287 U. S. 435, 453–454; *Agnello* v. *United States*, 269 U. S. 20; *United States* v. *Lee*, 274 U. S. 559; *Grimm* v. *United States*, 156 U. S. 604, 610.

ping or of a concealed eavesdropper, serves to reveal to the law enforcement officers conversations which the parties thereto intended to keep private, is not determinative of the constitutional issue. The question is rather whether the use of a detectaphone is the type of intrusion upon the sanctity of the home to which the Fourth Amendment was intended to apply and, if so, whether, under the circumstances of this case, the particular intrusion was "unreasonable" within the meaning of the Amendment.

That this question is one of utmost gravity to the Government needs no emphasis from us. It will, we think, be readily admitted that the use of scientific devices such as the detectaphone and wiretapping may be indispensable to the detection and prevention of crime; the argument against the use of such devices must therefore be that the *desideratum* of crime prevention is overriden by the *desideratum* of privacy for the individual. Yet recent events serve as a vivid reminder of the extent to which not only the safety of the local community but also the very security of the nation may be undermined by the undetected activities of those bent on evil to the community or the nation. The Court should be slow, we believe—particularly in the absence of clear constitutional direction—to accept any arguments, such as those made in this case, which entail the conclusion that the United States has voluntarily handicapped itself by con-

stitutional prohibition in dealing with such activities. We would deprecate as much as anyone the indiscriminate use of wire-tapping or of detectaphones. But we insist that their use is a matter for Congress or, in the absence of congressional action, for the Executive to regulate, and not a matter that has been put beyond the realm of regulation by all-embracing constitutional interdict.

A. THE PRESENT CASE IS CONTROLLED BY THE *OLMSTEAD* DECISION

In *Olmstead* v. *United States*, 277 U. S. 438, this Court held that evidence procured by tapping telephone wires leading from the offices and residences of the defendant conspirators was not obtained in violation of any rights guaranteed to the defendants by the Fourth Amendment. The Court pointed out that the prohibition against unreasonable searches and seizures contained in the Amendment is, in terms, limited to "material things—the person, the house, his papers or his effects" (277 U. S. at 464), and that therefore there must be "a seizure of his papers or his *tangible* material effects, or an actual *physical invasion* of his house 'or curtilage' for the purpose of making a seizure" (p. 466; italics supplied). This decision is clearly applicable to the present case, for if wire-tapping is not within the Fourth Amendment because it involves no physical invasion of the home or office and no actual seizure of tangible

papers or effects, the use of the detectaphone, which also involves no such invasion or seizure, is likewise beyond the scope of the constitutional prohibition.

Petitioners attempt to distinguish the two cases on the theory that a party to a telephone conversation runs "the risk that some one might overhear the conversation on that wire since his intention was to project his voice beyond the protection of his private premises", while petitioners in this case had "no intention of projecting their voices" beyond the walls of the room (Br. 17). The attempted distinction has no basis in reason or fact. The defendants in the *Olmstead* case no more intended to project their conversation over the telephone to the ears of government agents than petitioners did in the present case. And the risk was the same in each instance. The fact in both cases is that the energy which motivated the detecting instruments had traveled beyond the confines of the business office—in the *Olmstead* case by vibrations carried over a wire, in the present case by vibrations carried through the air or ether unaided by a wire, but amplified by a mechanism located beyond the limits of the office. The description by this Court of the situation in the *Olmstead* case is accordingly precisely applicable here: "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no

entry of the houses or offices of the defendants." (277 U. S. at 464.)

B. THE *OLMSTEAD* CASE WAS CORRECTLY DECIDED

Since the decision in the *Olmstead* case is applicable here, the evidence obtained through the use of the detectaphone was properly admitted against the petitioners unless, as petitioners imply and *amicus curiae* Congressman Eliot contends, the *Olmstead* case does not enunciate the correct constitutional principle. We submit, however, that the *Olmstead* decision is correct, that it is necessitated by the plain language of the Fourth Amendment, and that it is the only possible decision consonant with the historical purpose of the Amendment.

1. The historical background and original purpose of the Amendment are clear and well known. Reflecting acceptance of the ancient principle that "every man's home is his castle," the Amendment was designed to prevent the intolerable abuses which had resulted from the use of general warrants and writs of assistance in England and in the colonies and of *lettres de cachet* in France.* This

* *Boyd* v. *United States*, 116 U. S. 616; *O'Connor* v. *United States*, 281 Fed. 396, 397 (D. N. J.); *Annals of Congress*, Vol. I, Col. 434, 754; May, *Constitutional History of England*, Vol. II, p. 110 *et seq.*, p. 245 *et seq.*; Cooley, *Constitutional Limitations* (8th ed.), Vol. I, p. 612; Cornelius, *Search and Seizure* (2d ed., 1930), pp. 14–16; Harno, *Evidence Obtained by Illegal Search and Seizure*, 19 Ill. L. Rev. 303; Lasson, *The History and Development of the Fourth Amendment* (1937); Wood, *The Scope of the Constitutional Immunity Against Searches and Seizures*, 34 W. Va. L. Q. 1.

Court has not given the Amendment a technical construction but rather, in a long series of cases, has committed itself to the principle that the Amendment is "to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty." *Olmstead* v. *United States*, 277 U. S. 438, 465. Accordingly, the Court has struck down as in violation of the Amendment every unwarranted attempt, in whatever guise, either physically to invade the home or office or to seize any tangible paper or effects.[5] And, in the interest of assuring compliance with the purpose and spirit of the Amendment, the Court has ruled that evidence obtained by an unlawful search and seizure is inadmissible in the federal courts,[6] even though the rule at common law with respect to the admissibility of evidence unlawfully obtained is otherwise.[7]

But although the language of the Amendment has been liberally construed in order to achieve its

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[5] *Ex parte Jackson*, 96 U. S. 727; *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Silverthorne* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; *Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20.

[6] See *Boyd* v. *United States*, *supra*; *Weeks* v. *United States*, *supra*.

[7] *Commonwealth* v. *Dana*, 2 Metc. 329 (Mass. 1841); *People* v. *Mayen*, 188 Cal. 237, 251; *People* v. *Defore*, 242 N. Y. 13; Wigmore, *Evidence* (3d ed., 1940), Vol. 8, Section 2183; and see Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A. B. A. J. 479, where the American, English, and Canadian decisions are collected.

historical purpose, this Court has thus far refused—and we believe correctly—to read the specific terms of the Amendment, protecting the "right of the people to be secure in their *persons, houses, papers, and effects,* against unreasonable *searches and seizures*" [italics supplied] into a general guarantee of the "right to be let alone"—the right which Mr. Justice Brandeis believed that the Amendment should be construed to comprehend. See his dissenting opinion in *Olmstead* v. *United States, supra,* at 478. As the majority opinion in the *Olmstead* case pointed out (p. 466), not a single federal decision up to that time had held that there was an unreasonable search and seizure within the meaning of the Fourth Amendment unless there had been a physical invasion by force—or its equivalents, trickery or compulsion*—for the purpose of seizing tangible objects. And with the possible exception of *Nueslein* v. *District of Columbia,* 115 F. (2d) 690 (App. D. C.) we have been unable to find any case since that time which goes beyond these criteria, as petitioners suggest that this Court should now do.

It cannot be overemphasized that we are not dealing here with a broad and general constitutional guarantee such as due process of law, or freedom of speech and of the press, or the prohibition against cruel and unusual punishments, nor with broad regulatory powers, such as that conferring upon Congress the authority "To regulate

* E. g., *Boyd* v. *United States,* 116 U. S. 616; *Gouled* v. *United States,* 255 U. S. 298.

Commerce * * * among the several States". Rather we are dealing with a constitutional limitation upon the law enforcement powers of government which the framers of the Constitution saw fit to make unusually specific and which was adopted to deal with a specific evil. The framers could not have been unaware of the intrusion upon the "right to be let alone" which results from eavesdropping by law enforcement agents, or from the use of stool pigeons or informers—yet the prohibition of the Fourth Amendment was not directed against such methods of crime detection but only against the specific evil of searches and seizures, without proper warrant, of persons, houses, papers and effects. Other evils of kindred nature were left to be dealt with, as the occasion might require, by the government which the framers created.

We freely concede, as we have often insisted, that the Constitution is not to be read with the literal exactness with which a code of laws frequently must be read. The Constitution is a living document for all time and must therefore be liberally construed to achieve its purpose. But the purpose of the Fourth Amendment, as its history and its plain language show, is to protect against specific forms of abuse of the investigatory powers of government, and not to regulate that power generally.[9] To read the Amendment as containing a

[9] It should be noted that even in *Entick* v. *Carrington*, 19 Howell's St. Tr. 1029, 1066, from which the rule of immunity from invasion stems, Lord Camden observed that "the eye cannot be guilty of a trespass."

sweeping guarantee of the "right to be let alone," therefore, would not be a liberal construction designed to carry out the purpose of the framers, but rather judicial amendment of the Constitution to carry out a far more comprehensive purpose, the wisdom of which is a matter of delicate political judgment, involving a choice among sharply conflicting considerations—a choice not made by the framers except with respect to the particular problem with which they dealt. This Court, we submit, should be reluctant in any case so to enlarge the Constitution by judicial construction; it should be particularly reluctant to do so where, as here, the effect would be to place a serious limitation upon the power of government to protect its citizens against those who would rob, kidnap, or cheat them, or who would endanger the security of the nation.

2. This Court has not in the past been insensitive to the need to balance the "right to be let alone" against the public interest in effective enforcement of the laws. In *Hester* v. *United States*, 265 U. S. 57, in an opinion by Mr. Justice Holmes, the Court sustained the admissibility of evidence obtained by federal enforcement officials who, without a search warrant, trespassed upon a man's land in order to observe his activities, when there was reasonable ground to believe that the man was violating the law. In *Carroll* v. *United States*, 267 U. S. 132, this Court held that the Fourth Amendment did not forbid prohibition agents from

stopping a private passenger automobile proceeding along a public highway, in order to search for and seize liquor concealed in the upholstery, although the agents acted without warrant but upon reasonable belief that the automobile was being used for bootlegging. Mr. Justice Brandeis joined in the Court's decision in *Agnello* v. *United States*, 269 U. S. 20, where the arrests were made without warrant after the government agents, by looking through the windows into the house of one of the defendants, saw the defendants selling cocaine. See also *United States* v. *Feldman*, 104 F. (2d) 255 (C. C. A. 3), certiorari denied, 308 U. S. 579. Again, in *United States* v. *Lee*, 274 U. S. 559, this Court held that the use of a searchlight to observe activities in a small boat at sea was not a search within the meaning of the Fourth Amendment. The Court pointed out (p. 563) that the "use of the searchlight was comparable to the use of a marine glass or field glass" which "is not prohibited by the Constitution." Yet the use of the detectaphone is obviously only an aid to hearing as a searchlight, marine glass, or field glass is an aid to sight. All invade privacy equally and, at least where a field or marine glass is used, those whose conduct is observed are likely to be as unaware of the surveillance as when a detectaphone is used. Moreover, the element of secret observation was pres-

ent as fully in the *Agnello* case as in the *Olmstead* case."[10]

It is apparent, therefore, that purely sensory observation, or even "scientific" eavesdropping in which a mechanical instrument is used as an aid to the senses, does not constitute a "search" or "seizure" within the Amendment, for there is no physical invasion of house or office or person and no actual seizure of any paper or tangible effect.[11] The present case falls well within

[10] See also *United States* v. *Harnish*, 7 F. Supp. 305 (D. Me.). There government agents used a radio direction finder, a mechanical apparatus, to locate an outlaw radio station engaged in broadcasting signals to liquor-smuggling vessels. In rejecting the defendant's claim of violation of his rights under the Fourth Amendment, the court said (p. 307): "To be sure, they heard through a mechanical apparatus; but that simply gave them more accurate information than their ears alone could receive." See Note, 19 Minn. L. Rev. 468–469.

[11] An exhaustive search of the cases in the lower federal courts and in the state courts has failed to reveal a single case in which the use of mechanical instruments as an aid to the senses has been condemned, or in which evidence was excluded, in the absence of statute, on the ground that it was obtained by eavesdropping, with or without scientific aids. Cf. *Schoborg* v. *United States*, 264 Fed. 1 (C. C. A. 6), certiorari denied, 253 U. S. 494; *United States* v. *Weiss*, 34 F. Supp. 99, 101 (S. D. N. Y.); *People* v. *Cotta*, 49 Cal. 166; *State* v. *Allen and Carter*, 37 La. Ann. 685; *Goode* v. *State*, 158 Miss. 616; *Springer* v. *Byram*, 137 Ind. 15; *DeLore* v. *Smith*, 67 Ore. 304; *Commonwealth* v. *Wakelin*, 230 Mass. 567; *State* v. *Minneapolis Milk Co.*, 124 Minn. 34, 43; *Shields* v. *State*, 104 Ala. 35; *Cohen* v. *State*, 120 Tenn. 61; *Commonwealth* v. *Everson*, 123 Ky. 330; *Brindley* v. *State*, 193 Ala. 43; *Miller* v. *The People*, 70 Colo. 313; *State* v. *Center*,

this rule, for when the agents affixed the detectaphone to the wall of Room 1508, there was no greater intrusion legally upon petitioners' rights than if the agents had pressed their ears against the wall to overhear the conversations or had pressed their faces against the windows to peer inside. As the court below pointed out (R. 1095), "The situation was legally no different from the use of an amplifier of sound to overhear conversation not otherwise audible to the listener as, for instance, the use of a common aid to hearing by a person somewhat deaf."

Petitioners make the novel argument that the use of the detectaphone is more than mere eavesdropping because "eavesdropping connotes a situation where the person whose conversations are overheard has been careless" and that, since petitioners took "reasonable and ordinary precautions" to hide what they said, the Government should not be permitted to put in evidence the conversations which were nevertheless overheard

35 Vt. 378, 382; *Hoy* v. *Morris*, 13 Gray (Mass.) 519; *Knight* v. *State*, 114 Ga. 48; *State* v. *Hester*, 134 S. E. 885 (S. C.); *Padgett* v. *State*, 125 Ark. 471; *Hunter* v. *State*, 111 Tex. Cr. 252; *United States* v. *Harnish*, 7 F. Supp. 305 (D. Me.); see 3 Wharton, *Criminal Evidence* (11th ed., 1935), p. 2340.

The admission of evidence obtained by wire-tapping has never been successfully challenged on the ground that it was obtained in violation of the Fourth Amendment. See *Valli* v. *United States*, 94 F. (2d) 687 (C. C. A. 1); *Kerns* v. *United States*, 50 F. (2d) 602 (C. C. A. 6); *Foley* v. *United States*, 64 F. (2d) 1 (C. C. A. 5), certiorari denied, 289 U. S. 762.

(Br. 18). Under this test, an informer secreted in the room with consent of the owner or lawful tenant would not be permitted to testify because people do not ordinarily examine the closets and look under the table before they engage in conversation. Further, under this contention it would be impossible to use evidence obtained by feigned accomplices, stool pigeons, and similar police methods which manifestly invade the privacy of criminals as fully as a detectaphone, and which yet cannot be discovered by the use of ordinary precautions. The answer to the argument was given by Mr. Justice Roberts in his separate opinion in *Sorrells* v. *United States*, 287 U. S. 435, where he stated (pp. 453–454):

> Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of the crime. Resort to such means does not render an indictment thereafter found a nullity nor call for the exclusion of evidence so procured. * * *

See also *McGuire* v. *United States*, 273 U. S. 95, 99, where the Court pointed out that "A criminal prosecution is more than a game where the Government may be checkmated and the game lost merely because its officers have not played according to rule." [12]

[12] Petitioners also urge that, even though the agents lawfully entered the adjoining office, the affixing of the detecta-

Surely the use of feigned accomplices, stool pigeons, and informers is quite as distasteful a business as wire-tapping or the use of a detectaphone; we can conceive no logical reason why the one method of crime detection should be deemed within the constitutional protection and the other without. And unless the petitioners can suggest such a logical reason—as distinct from a purely emotional reaction—we believe that no distinction between the two types of situation should or properly can be drawn.

3. To the fear expressed by Mr. Justice Brandeis in the *Olmstead* case of the effects of scientific progress in crime detection upon privacy (p. 474) we suggest that when men learn to see through walls and to read thought, these faculties will be employed by criminals against society and society should be able to protect itself by the same

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phone to the outer wall of Shulman's office amounted to an unconstitutional trespass, just as if it were placed on the outside wall of a "shack isolated in the woods" (Br. 16–17). The short answer to petitioners' contention is that Shulman had no control over the inside walls of the adjoining office, and therefore the agents committed no trespass in using the detectaphone. Moreover, even if we accept petitioners' hypothetical case, the law is settled that the constitutional guaranty is not coextensive with the definition of a civil trespass, and that a mere trespass, even for the purpose of observation, where there is no forcible entry, is not violative of the Fourth Amendment. *Hester* v. *United States*, 265 U. S. 57; *United States* v. *Phillips*, 34 F. (2d) 495 (N. D. N. Y.); *Koth* v. *United States*, 46 F. (2d) 59 (C. C. A. 9); *Raine* v. *United States*, 299 Fed. 407 (C. C. A. 9), certiorari denied, 266 U. S. 611; cf. *McGuire* v. *United States*, 273 U. S. 95.

weapons. In any event, Congress, we may assume, will be alive to the problem should it arise. And to the fear which others suggest that wire-tapping and similar devices may be used to harass dissident political groups, our answer is that the liberty of the individual lies not in a man's right not to have his words and thoughts known in a court of law but in a firm protection of freedom of speech and of thought.[18] In other words the problem in the present case is limited strictly to the Fourth and

[18] "In this connection, a fear has been expressed that freedom of opinion will be endangered if such evidence may be received. A system of espionage of the Old World variety is visioned, wherein one's privately expressed opinions and his copy of Marx behind the door in the library will be ferreted out and used in evidence against him—for just what crime is not made clear. So long as we have no political crimes, we need not fear that such evidence will be used to our hurt. Some fear, perhaps justifiably, that we may see again the Sedition Acts of old, and they feel that we should begin now to exclude illegally obtained evidence and not set a precedent which may be availed of at that time. But the government that so far breaks with our time-honored traditions of freedom of speech and opinion, that so far ignores Constitutional restrictions as to make one's views criminal, will not be deterred by another tradition a quarter of a century old! If we are to have political crimes, the necessary rules of evidence will come in as their handmaidens, even though we exclude them now. Therefore, we need not fear that we are setting dangerous precedents for those who will need none. The question is properly considered in the light of what we, today, recognize as crimes. If the guardians of liberty will focus their attention on the substantive law, they need not fear that any innocent man will suffer from the admission of any reliable evidence." Plumb, *Illegal Enforcement of the Law*, 24 Corn. L. Q. 337, 372–373.

Fifth Amendments (*Boyd* v. *United States*, 116 U. S. 616) and has nothing to do with the First Amendment. Plainly the right to say and think what one pleases without fear of governmental retribution differs widely from the right not to have one's thoughts and words known and weighed by our tribunals of justice in the enforcement of the criminal law. Freedom of speech is a valuable right, not because it insures the liberty to speak and think in secret, but because it permits the free expression of opinion and the free interchange of ideas. Cf. dissent of Mr. Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 630.

We do not deny, of course, that the employment of devices such as the detectaphone and wire-taps may be abused. Instances of abuse (mostly at the hands of persons other than federal law officers) are cited in the brief *amicus curiae* filed by Congressman Eliot. But it seems obvious that such occurrences, except in the case of federal law officers, would not be prevented by holding them to be violations of the Fourth Amendment, since that amendment contains no deterrent penalties. Moreover, many of the abuses mentioned by Congressman Eliot were in violation of the Federal Communications Act, thus indicating that they may occur even though unlawful and even though Congress enacts penalty provisions.

The possibility of abuse exists as to each of the useful powers of government, but this fact is an argument for punishing abuse or for enacting reg-

ulatory legislation, and not for constitutional elimination of those powers.[14] "It must be remembered," said Mr. Justice Holmes in *Missouri, Kansas & Texas Ry Co.* v. *May*, 194 U. S. 267, 270, "that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." And in discussing the restrictions upon the constitutional spending power in *United States* v. *Butler*, 297 U. S. 1, 87, Mr. Justice Stone added, "Another is the conscience and patriotism of Congress and the Executive." As was pointed out in both cases, an enlightened people, acting through a responsible legislature and executive, is the ultimate safeguard of liberty.

Congressman Eliot, in his brief *amicus curiae*, states (p. 8) that in general the use of scientific devices to intercept messages does not serve its avowed purpose of catching criminals. He also urges (pp. 13–15) that the prevalent use of such devices, including, apparently, by Government officers, might constitute a threat to national defense. Excerpts from various statements by Government officials are cited in support of these contentions. These excerpts, however, give a misleading picture of the real views of those immediately charged with the duty of preventing crime, appre-

[14] Compare Mr. Justice Holmes' treatment of the "abuse argument" as applied to the question of state taxation of federal instrumentalities: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223.

hending criminals, and safeguarding our country from enemies both foreign and domestic. According to those officers, who presumably are in the best position to judge the utility of and need for the devices in question, it is not merely desirable, but essential, that methods of detection such as wire-tapping be resorted to in certain classes of crimes, notably in cases of espionage, sabotage, kidnapping and extortion.

Thus in his Annual Report dated January 3, 1941, for the fiscal year ended June 30, 1940, Attorney General (now Mr. Justice) Jackson, in recommending legislation which would legalize the interception of messages in such cases, subject to appropriate safeguards, stated, *inter alia* (pp. 11–12): "Experience has shown that monitoring of telephone communications is essential in connection with investigations of foreign spy rings."[15] A similar view is held by the Director of the Federal

[15] See also the letter of Attorney General (now Mr. Justice) Jackson, dated March 19, 1941, to the chairman of the House Committee on the Judiciary, urging favorable action on H. R. 2266 which permitted wire-tapping in limited types of cases. Hearings before House Committee on the Judiciary on H. R. 2266 and H. R. 3099, 77th Cong., 1st Sess., pp. 18–20. The letter cited the following actual example of a case in which wire-tapping should be permitted: "A short time ago a small child was kidnaped in California. There was reason to expect that demands would be made upon the parents by telephone. If the voice making such a call were recorded, preserving its accents, its peculiarities of speech, and its exact words, it would be a scientific means of identification not subject to the faults of hearing or of memory which so often make identification weak. It might be decisive in saving the

Bureau of Investigation. In February 1941, in recommending the adoption of legislation such as that favored by the Attorney General, he stated:

> * * * my view is that wire tapping should not be permitted except as to such crimes as I have described, and even then in such limited group of cases only under strict supervision of higher authority exercised separately in respect to each specific instance. In the group of cases I have in mind, such as espionage, sabotage, kidnaping, and extortion, wire tapping as an investigative function is of considerable importance.[16]

Likewise, in a letter to Congressman Eliot dated February 21, 1941, which was introduced in hearings before the House Judiciary Committee, President Roosevelt, while pointing out that he did not believe wire-tapping should be used in cases of "domestic crimes" except possibly kidnaping and extortion, said:

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life of the child, or in convicting the kidnaper, and it might be equally decisive in clearing an innocent person unfortunate enough to be under suspicion."

In a press release dated March 18, 1940, the Attorney General said that he was informed by the Director of the Federal Bureau of Investigation that "without the use of wire-tapping several kidnapping cases would not have been solved."

[16] Hearings before House Committee on the Judiciary, *supra*, p. 112. Attorney General Biddle holds a similar view. See Hearings on nomination of Francis Biddle as Attorney General, before subcommittee of Senate Committee on the Judiciary, 77th Cong., 1st Sess., not printed.

> There is, however, one field in which, given the conditions in the world today, wire tapping is very much in the public interest. This Nation is arming for national defense. It is the duty of our people to take every single step to protect themselves. I have no compunction in saying that wire tapping should be used against those persons, not citizens of the United States, and those few citizens who are traitors to their country; who today are engaged in espionage or sabotage against the United States.[17]

It should be noted, too, that in 1938 both houses of Congress passed legislation authorizing federal law enforcement officials to intercept communications in any criminal investigation. S. 3756, 75th Cong., 3rd Sess., 83 Cong. Rec. 7053, 7054, 9453. The bill failed to become a law because there was a slight difference in phraseology in the form in which it passed the two houses and the session closed before the difference was cured. See Annual Report of the Attorney General for 1940, p. 12.

Any possible doubt as to the utility of mechanized interception must vanish in the face of the recent report of the Commission headed by Mr. Justice Roberts appointed by the President to ascertain and report the facts relating to the Japanese attack upon Hawaii. The pertinent portions of the report, which is dated January 23, 1942, are set

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[17] *Id.*, p. 257.

forth in the footnote.[18] They show, in substance, that one of the reasons for the success of the attack was the fact that restrictions against resort to "certain methods" (i. e., presumably interception and

[18] Paragraph XVI of the Commission's findings of fact, as reported in the New York Herald Tribune, January 25, 1942, states *inter alia:*

"There were, prior to December 7, [1941] Japanese spies on the Island of Oahu. Some were Japanese consular agents and others were persons having no open relations with the Japanese foreign service. These spies collected, and through various channels transmitted, information to the Japanese Empire respecting the military and naval establishments and dispositions on the island.

* * * * * *

"* * * The United States being at peace with Japan, restrictions imposed prevented resort to certain methods of obtaining the content of messages transmitted by telephone or radio telegraph over the commercial lines operating between Oahu and Japan. The bureau and the local intelligence staffs were unable, prior to Dec. 7, to obtain and make available significant information respecting Japanese plans and fleet movements in the direction of Hawaii.

* * * * * *

"It was believed that the center of Japanese espionage in Hawaii was the Japanese consulate at Honolulu. It has been discovered that the Japanese consul sent to and received from Tokyo in his own and other names many messages on commercial radio circuits. This activity greatly increased toward Dec. 7. The contents of these messages, if it could have been learned, might have furnished valuable information. In view of the peaceful relations with Japan and the consequent restrictions on the activities of the investigating agencies they were unable prior to Dec. 7 to obtain and examine messages transmitted through commercial channels by the Japanese Consul, or by persons acting for him."

Paragraph 15 of the Commission's conclusions refers to two messages from the War Department to the commanding

the like) of obtaining the contents of telephone and radio telegraph messages to Japan prevented effective counter espionage.

Another recent example indicating the disastrous consequences which might result from construing the Fourth Amendment in the manner advocated by the petitioners, is afforded by the facts revealed in a letter dated June 30, 1941, from Attorney General Jackson to Representative Sabath, Chairman of the House Rules Committee (Debate on H. R. 2266, 87 Cong. Rec., unbound, p. 5884, 77th Cong., 1st Sess., June 30, 1941). The letter stated:

> You may be interested to know that since the hearings before the Judiciary Committee the sabotage of Axis ships in American harbors was ordered by telegraph. Several of the ships' masters have themselves asserted the receipt of telegrams from the Italian naval attaché to that effect.

It concluded:

> * * * Unless we can have legislation of the type I have recommended, our wire systems will continue to be the safest and most effective methods of communication that foreign agents can employ against our Government.

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general at Hawaii "which warned him not to resort to illegal methods against sabotage or espionage"; and paragraph 19, listing the causes contributing to the success of the attack, lists among other causes "Restrictions which prevented effective counter-espionage."

We use these illustrations, not as an argument *in terrorem*, but to show the implications of the position which this Court is now asked to adopt. It may seem of no great consequence whether under the Fourth Amendment police officers may use a detectaphone to overhear the conversations of dishonest attorneys plotting to rob creditors of $400.00. But it is of vital consequence whether a military officer or other government agent may overhear or intercept the communications of suspected spies or saboteurs. We earnestly submit, therefore, that the Court should follow its conclusion in the *Olmstead* case, and should hold that the use of devices such as the detectaphone and wire-tapping is not to be sacrificed to speculative fears of future abuse, any more than is the exercise of any of the other powers of government.

C. EVEN IF THE USE OF THE DETECTAPHONE CONSTITUTED A SEARCH, IT WAS NOT AN "UNREASONABLE" SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

If, despite the contentions we have advanced, this Court should see fit to overrule the *Olmstead* decision and should hold that the use of a detectaphone constitutes a "search," the question would still remain whether the "search" in this case was "unreasonable" within the meaning of the Fourth Amendment. This, in turn, requires inquiry as to what standard of "reasonableness" is to be applied to the use of such devices as the

detectaphone and wire-tapping in the absence of Congressional action.

The general rule established by the courts with respect to the ordinary type of search and seizure is that a search or seizure without a warrant is reasonable only when incidental to an arrest for which there is probable cause. See *Agnello* v. *United States*, 269 U. S. 20; *Carroll* v. *United States*, 267 U. S. 132.[19] In all other cases, a warrant, based on sufficient affidavit or application, properly describing the person, premises, and property to be seized, appropriately executed and returned, is a prerequisite to the reasonableness of the search.[20]

This rule obviously cannot be assimilated to a situation like that presented in the instant case. There is no possible occasion for a detectaphone "search" incidental to an arrest. Speech during the course of an arrest is likely neither to be enlightening in crime detection nor to require the use of any device such as the detectaphone or wire-tapping in order for it to be heard.

[19] Even then, of course, there are limitations upon what property may be taken in connection with an arrest, and the scope of search incidental to the arrest. Cf. *Gouled* v. *United States*, 255 U. S. 298; *Amos* v. *United States*, 255 U. S. 313; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.

[20] For a collection of decisions as to the necessary elements of valid warrant, see Cornelius, *Search and Seizure* (1930 ed.), pp. 339–583.

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Nor can the failure to obtain a warrant to use the detectaphone be decisive. Whatever the practical possibilities of devising a warrant procedure for the use of such instruments,[21] Congress has provided no such procedure as yet. And current warrant procedure is not capable of application to "search" by detectaphone, for it deals with the taking of stolen or embezzled property or property used to commit a felony, requires an underlying affidavit "particularly describing the property," enjoins the issuing officer to command the searcher forthwith to search "for the property specified, and to bring it before the judge or commissioner," and directs the searcher to deliver to the issuing officer "a written inventory of the property taken" (Act of June 15, 1917, 40 Stat. 217, 228, 229, 18 U. S. C., secs. 612, 613, 616, 623).

No argument can be made that the absence of a warrant procedure applicable to detectaphones reflects a Congressional determination that they shall not be used. Congress was informed by this

[21] See Art. 1, Sec. 12, of the New York Constitution, 1938, which provides for a warrant procedure for wire-tapping:

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

See Greenman, *Wire Tapping. Its Relation to Civil Liberties*, pp. 44–48.

Court in the *Olmstead* case that the use of such devices did not constitute a "search" at all; consequently Congress can scarcely be deemed to have disapproved of their use, simply because it did not provide for a warrant procedure which it had no reason to believe was necessary. On the contrary, if the silence of Congress under these circumstances signifies anything, it is that Congress believes it unnecessary at present to place restrictions upon the use of the detectaphone.

Furthermore, a holding that the "reasonableness" of the use of a detectaphone is to be judged by orthodox warrant standards would probably preclude Congress from ever legislating on the subject at all. This is so because this Court has said that the warrant provision of the Fourth Amendment prohibits warrants to secure evidence and that only instruments of crime or contraband property may be seized under a warrant. *Boyd* v. *United States*, 116 U. S. 616; *Gouled* v. *United States*, 255 U. S. 298; *United States* v. *Lefkowitz*, 285 U. S. 452. To import this restriction into the field of "search" by aural observation would be to bar law enforcement officers from the effective use of detectaphones and similar devices and reserve their use only to wrongdoers. For the primary necessity and utility of the devices is to secure evidence. And even in those comparatively few cases where the speech which is "searched" may be said to be an "instrument" of

the crime, a warrant, if one be held necessary, could not issue under the orthodox rules since it would be impossible to ascertain in advance precisely when and what part of any particular conversation would be an element of the crime, what part would be "evidence" of the crime, and what would be wholly irrelevant to any matter of legitimate public concern. Consequently, it seems clear that a decision holding that the securing of a warrant is a prerequisite to the use of a detectaphone, and that no warrant can be issued in respect of "evidential" speech, would mean a practical prohibition of this essential crime detection device, even under the most careful safeguards.[22]

In view of these considerations, we believe that if the concept of what is a "search" under the Fourth Amendment is extended, the view as to what constitutes an "unreasonable" search must be adjusted accordingly. The issue is not unlike that presented to this Court in *Carroll* v. *United States*, 267 U. S. 132. There the Court was faced with the new problem of detecting bootleggers in fast-moving automobiles upon a heavily traveled highway which made the use of search warrants impracticable. The Court departed from the usual rule that a search may not be made without

[22] The State of New York recognized that "search" of speech as a practical matter necessitated search for evidence and, accordingly, included in its Constitution permission to tap wires for evidence, under proper safeguards. See *supra*, note 21, p. 43.

a warrant except as an incident to an arrest, and held that the search of an automobile for contraband, without any warrant at all, was reasonable if made upon probable cause that the Prohibition Act was being violated. The Court pointed out that the Fourth Amendment does not denounce all searches and seizures, but only such as are "unreasonable" (267 U. S. at p. 147) and that the question of what is reasonable must be determined "in a manner which will conserve public interests as well as the interests and rights of individual citizens" (p. 149). See also *United States* v. *Lee*, 274 U. S. 559; *Husty* v. *United States*, 282 U. S. 694.

Considerations equally as important as those which motivated the Court to adjust the concept of "reasonableness" in the *Carroll* case should, we submit, prompt the Court to adjust it similarly in the case of detectaphones. The Court should hold, we believe, that the use of a detectaphone, if it is a "search" at all, is not an "unreasonable" search when the detectaphone is used by law enforcement officers who have reasonable cause to believe that by its use they will obtain evidence revealing the commission of a crime. Such a holding is, we think, required by society's need for the efficient detection and apprehension of criminals and involves no undue sacrifice of the privacy of individuals. As Mr. Justice Cardozo stated in *Snyder* v. *Massachusetts*, 291 U. S. 97, 122, "justice though due to the accused is due to the accuser

also"; the task of the Court is to "keep the balance true." To characterize as "unreasonable"[23] the use of a detectaphone where there is reasonable cause to believe that evidence will be obtained revealing the commission of a crime would constitute, we submit, an undue tipping of the scales in favor of the individual's interest in privacy at the expense of society's right of self-defense.[24]

In any event, in the present case the use of the detectaphone may be sustained under the normal rules governing ordinary searches without a warrant, upon the narrow ground that the conversa-

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[23] "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357.

[24] In replying to Congressman Eliot's inquiry as to his views concerning H. R. 2266, a bill to authorize wire-tapping under certain conditions, President Roosevelt stated:

"The use of wire tapping to aid law-enforcement officers raises squarely the most delicate problem in the field of democratic statesmanship. It is more than desirable; it is necessary that criminals be detected and prosecuted vigilantly as possible. It is more necessary that the citizens of a democracy be protected in their rights of privacy from unwarranted snooping. As an instrument for oppression of free citizens, I can think of none worse than indiscriminate wire tapping.

"Somewhere between these two conflicting ideals we must find balance. We must find that balance whereby society is protected against the criminal and at the same time the citizens of that society are protected against over-zealous prosecution by law-enforcement officials. We will not achieve perfection, because it does not exist."

Hearings before House Committee on the Judiciary on H. R. 2266 and H. R. 3099, 77th Cong., 1st Sess., p. 257.

tions "searched" were a part of a crime in process of being committed.

Hoffman, a reputable attorney, promptly reported petitioners' felonious scheme to the referee in bankruptcy, and immediately thereafter to the government agents (R. 202, 291). Acting under instructions of the government agents, Hoffman then feigned willingness to participate in the conspiracy and attended the several conferences at which the petitioners planned its execution (R. 291). Meanwhile, as arranged with the government agents, Hoffman kept the agents informed of the scheduled conferences (R. 303); it was pursuant to this information that the detectaphone was installed and was utilized on the occasions which Hoffman indicated as appropriate (R. 303).

In these circumstances, it is clear that the agents had probable cause to believe that a crime was being committed in Shulman's office on the afternoon that the detectaphone was affixed to the outer wall, and thereafter on the days when the detectaphone was used. Furthermore, the agents had reliable information which made it possible for them to focus their listening on the precise conversations which themselves constituted the conspiracy.

If there was a "search," therefore, it was a "search" for the very conversations which were the instruments of the crime. For in a conspiracy the conspirators' plottings are the instruments of the crime just as a gun may be the in-

strument of murder or opium the instrument of a narcotic violation. Accordingly, the "search" was within the narrow rule which holds that weapons or contraband are proper objects of search. Cf. *Weeks* v. *United States*, 232 U. S. 383; Act of June 15, 1917, Title XI, 40 Stat. 217, 228–230, 18 U. S. C. secs. 611–633. We submit that the interests of society justify this type of "search" where conversations are used as the instruments of a conspiracy as fully as they justify the traditionally permissible seizure of tangible weapons or contraband.

D. IN ANY EVENT, NO CONSTITUTIONAL RIGHTS OF PETITIONERS THEODORE AND MARTIN GOLDMAN WERE INVADED

Even if the Court overrules all our foregoing contentions and holds that the use of the detectaphone was an unreasonable search forbidden by the Fourth Amendment, it should sustain the affirmance of the convictions of petitioners Theodore and Martin Goldman. The detectaphone was placed on the outer wall of petitioner Shulman's office only, and its use cannot reasonably be said to have violated the constitutional right of the Goldmans "to be secure in their persons, houses, papers, and effects."

The decisions of the lower federal courts are uniform to the effect that the immunity granted by the Fourth Amendment is personal to the owner or lawful tenant of the premises searched, hence that only he may complain of the admission of evidence

uncovered by the search."[25] Cf. *Agnello* v. *United States*, 269 U. S. 20, 35.

In their brief petitioners do not attack the rule of the decisions cited in the footnote. Nor do they otherwise urge, as distinct from assume (Br. 7, 34), that the Goldmans have standing to complain of the evidence obtained by means of the detectaphone. It may also be noted that the motion to suppress the evidence was filed in behalf of Shulman alone (R. 20–27). Moreover, there is no possible basis for a claim that any constitutional right of Theodore Goldman was infringed. He was not even present in Shulman's office during any of the conversations which were overheard.

It is true that Martin Goldman participated in one of the conferences which were overheard and

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[25] *Coon* v. *United States*, 36 F. (2d) 164 (C. C. A. 10); *Lewis* v. *United States*, 92 F. (2d) 952 (C. C. A. 10); *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Belcher* v. *United States*, 50 F. (2d) 573 (C. C. A. 8); *Shore* v. *United States*, 49 F. (2d) 519 (App. D. C.), certiorari denied, 283 U. S. 865; *Ingram* v. *United States*, 113 F. (2d) 966 (C. C. A. 9); *Creech* v. *United States*, 97 F. (2d) 390 (C. C. A. 5); *MacDaniel* v. *United States*, 294 Fed. 769 (C. C. A. 6), certiorari denied, 264 U. S. 593; *Remus* v. *United States*, 291 Fed. 501 (C. C. A. 6), certiorari denied, 263 U. S. 717; *Chicco* v. *United States*, 284 Fed. 434 (C. C. A. 4); *Connolly* v. *Medalie*, 58 F. (2d) 629 (C. C. A. 2); *Haywood* v. *United States*, 268 Fed. 795 (C. C. A. 7), certiorari denied, 256 U. S. 689; cf. *Nunes* v. *United States*, 23 F. 2d) 905 (C. C. A. 1). See also Point IV of the Brief for the United States in *Goldstein* v. *United States*, No. 256, present term.

related in evidence. But since there was no physical search of his person or invasion of his property, it would be far removed from the language and purpose of the Fourth Amendment and from all usual notions of a "search" or "seizure" to hold that the Government agents violated any right of his. If such a holding were made, on the theory that he had a right not to have his conversation overheard by a concealed scientific device, it would seem that a similar holding would be required even if the case were one where the Government agents had obtained Shulman's consent to using the detectaphone, or had used it at his direction. Furthermore, if a person has a right not to have his conversation overheard by such a device, it would be an absurd distinction for the courts to continue to sustain the more familiar, though less accurate, police methods of ordinary eavesdropping, shadowing suspects, and using informers—methods which were known long prior to the Fourth Amendment, and, as this Court has indicated, were not intended to be barred by it. Cases cited footnote 3, *supra*, p. 20.

III

LISTENING BY MEANS OF A DETECTAPHONE TO ONE WHO TALKS INTO A TELEPHONE IS NOT A VIOLATION OF SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT

Petitioners' contention (Br. 22) that Section 605 of the Federal Communications Act was violated when the government agents overheard, by

means of the detectaphone, Shulman's end of two telephone conversations as he spoke into the receiver is without merit. There was neither "communication" nor "interception" within the meaning of the Act.

Petitioners' view that a communication comes within the protection of the Act "once a speaker has uttered words with the intent that they constitute the transmission of a telephonic conversation" (Br. 25–26) ignores the plainly expressed purpose of the Communications Act to protect the privacy of the means of communication and not the secrecy of the conversations. The scope of the protection is thus defined by Section 3:

> (a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

In other words, the protection of the statute attaches only to the message in the course of its transmission by the telephone, telegraph, or radio company. See *Diamond* v. *United States*, 108 F. (2d) 859 (C. C. A. 6), where it was held (p. 860) that "the privacy to be achieved by the mandate

of the statute—the privacy of a conduit or instrumentality".

Words are not endowed with special immunity simply because they are spoken into a telephone mouthpiece "with the intention" that they constitute a "wire communication." The user of a telephone entrusts his message to the circumambient air which, indifferently, conveys his words to telephone pick-up: friendly bystanders, casual eavesdroppers, or officers of the law. Only the message in its journey over transmission facilities has the protection of Section 605. The situation is not unlike the case of a letter intended for the mails, where it will be within the protection of the Fourth Amendment (*Ex parte Jackson*, 96 U. S. 727); the recollection of a stenographer and her notes of dictation are nevertheless unquestionably proper sources of evidence.

Not only were the words overheard not a "communication" within the meaning of Section 605, but there was no "interception." Shulman's message proceeded undisturbed from the telephone receiver over the wires to the other parties without any infringement by the agents upon this privileged channel of communication. In fact, as a matter of physics, the energy which was transformed into electrical vibrations by the telephone was different from the sound waves which motivated the impulses penetrating the wall and activating the delicate crystal in the detectaphone, although both had a common source in Shulman's

vocal cords.[26] Moreover, it is of the essence of a telephone interception that the interceptor be in a position to hear both parties to the conversation,[27] that is, the interception must occur somewhere along the conduit which the statute seeks to protect. Cf. *United States* v. *Polakoff*, 112 F. (2d) 888, 890 (C. C. A. 2), certiorari denied, 311 U. S. 653.

IV

PETITIONERS WERE NOT ENTITLED TO INSPECT CONFIDENTIAL MEMORANDA PREPARED BY FEDERAL AGENTS FROM WHICH THEY REFRESHED THEIR RECOLLECTIONS BEFORE BEING SWORN AS WITNESSES

Petitioners contend (Br. 27–33) that the trial judge erred in denying them an opportunity to inspect the notes and memoranda which the F. B. I. agents used to refresh their recollection in preparation for trial. The settled federal rule,

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[26] Contrary to the petitioners' assertion, we do not contend that the prohibition against interception is limited to "wire tapping, physical contact with telephone instruments or the means employed to ascertain the existence or contents of a communication" (Br. 25). If the Act may be violated as much by reading a telegram over a messenger's shoulder as it is by tapping a telephone wire, as petitioners suggest, it is because in each case the communication has been entrusted to the transmitting agent protected by Section 3 of the Communications Act.

[27] We do not argue, as petitioners imply, that "the words of both parties" must be overheard before there can be an interception of a communication, since manifestly there may be a prohibited interception where the sender talks to another who is not listening or fails to answer.

however, is to the contrary. As stated in *Lennon* v. *United States*, 20 F. (2d) 490, 494 (C. C. A. 8), "It is only where the witness uses the paper to refresh his memory while on the stand that there exists a right to compel the production of the writing for inspection." See also *Little* v. *United States*, 93 F. (2d) 401–407 (C. C. A. 8), certiorari denied, 303 U. S. 644, 668; *Mullaney* v. *United States*, 82 F. (2d) 638, 643 (C. C. A. 9); Jones, *Evidence* (2d ed. 1926) Vol. 5, sec. 2387; cf. *Hull Co.* v. *Marquette Mfg. Co.*, 208 Fed. 260, 265 (C. C. A. 8.); *Lowrie* v. *Taylor*, 27 App. D. C. 522.[28]

Moreover, even under the broader rule advocated by Professor Wigmore[29] permitting, at the discretion of the trial court, inspection of any refreshing memorandum, it cannot be said that the trial court abused its discretion. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 231–237. The court expressly refused to exhibit the documents to defense counsel at the preliminary hearing on the ground that to do so would have resulted in a premature disclosure of the Government's evidence (R. 108–111, 127, 477). See *Nardone* v. *United States*, 308 U. S. 338, 342;

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[28] See also *Northern Indiana Public Service Co.* v. *Vesey*, 210 Ind. 338; *State* v. *Paschall*, 182 Wash. 304; *State* v. *Magers*, 36 Ore. 38; *Hamilton* v. *Rice*, 15 Tex. 382; *State* v. *Kwiatkowski*, 83 N. J. L. 650; *State* v. *Hammond*, 46 Utah 249; *Loose* v. *State*, 120 Wis. 115.

[29] Wigmore, *Evidence* (3rd ed. 1940), Vol. 3, secs. 762, 765.

United States v. *Seaman*, 115 F. (2d) 371, 374-375 (C. C. A. 2).

In any event, the ruling of the trial court should be sustained upon the independent ground that the documents called for were privileged official documents (R. 477-478). Rev. Stat. 161, 5 U. S. C. § 22; Department of Justice Circular No. 3229, May 2, 1939;[30] see *Boske* v. *Comingore*, 177 U. S. 459; *Ex parte Sackett*, 74 F. (2d) 922 (C. C. A. 9); *In re Huttman*, 70 Fed. 699, 701 (D. Kan.); *In re Weeks*, 82 Fed. 729 (D. Vt.); *In re Lamberton*, 124 Fed. 446 (D. Ark.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (D. Ky.); 25 Op. Atty. Gen. 326.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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JANUARY 1942.

[30] The complete text of this circular is set forth in the Appendix, *infra*, p. 58.

APPENDIX

Department of Justice Circular No. 3229, May 2, 1939, provides:

> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of the United States Attorneys, Federal Bureau of Investigation, United States marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

Section 66, Rules and Regulations of the Federal Bureau of Investigation, United States

Department of Justice, issued and approved by the Attorney General, further provides:

(66) *Records and Information.*

* * * * * *

All records and information in the offices of the Federal Bureau of Investigation are in the custody and control of the bureau for the purpose of the detection and prosecution of crimes against the United States or the preparation of cases in which the United States is or may be a party in interest. Employees have no control over such records or information to permit the use thereof for any other than official purposes, except as hereinbefore noted. Therefore, if the court orders the production of such files, documents, records, or information, employees shall carefully prepare or procure a copy of the record or statement of information requested, and forward it to the bureau, whereupon it will be referred to the Attorney General, and under the Seal of the Department thereafter transmitted to the judge of the court requesting it, unless it shall be found that circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information.

The bureau desires to offer every possible assistance to the courts, and consideration must be given to each individual case as it arises. However, the above departmental order should be followed in all cases, and the bureau immediately notified in the event this rule is invoked.

456992—42——5 U. S. GOVERNMENT PRINTING OFFICE: 1942